

Case 3:06-cv-03750-MMC Document 22 Filed 08/03/06 Page 1 of 3

United States District Court

For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 CMG MORTGAGE SERVICES, INC., No. C-06-3750 MMC  
12 Plaintiff,  
13 v.  
14 WYMAC CAPITAL, INC.,  
15 Defendant /

**ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS OR, IN THE  
ALTERNATIVE, TO STAY; VACATING  
HEARING**

17 Before the Court is defendant Wymac Capital, Inc.'s motion to dismiss, filed July 3,  
18 2006, to dismiss plaintiff CMG Mortgage Services, Inc.'s complaint, pursuant to Rules  
19 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, to stay  
20 the instant action in light of an earlier-filed action pending in state court. Plaintiff has filed  
21 opposition, to which defendant has replied. Having reviewed the papers filed in support of  
22 and in opposition to the motion, the Court deems the matter suitable for decision on the  
23 papers, VACATES the hearing scheduled for August 11, 2006, and rules as follows.

24 1. Contrary to defendant's argument, plaintiff has adequately alleged standing to  
25 assert its claim for unfair competition in violation of the Lanham Act, as well as its derivative  
26 claim for declaratory relief. Specifically, plaintiff's allegations that it is a competitor of  
27 defendant, (see Compl. ¶ 5), that defendant has made false and misleading statements  
28 about defendant's products in its advertising, (see, e.g., Compl. ¶¶ 23, 31, 33, 34), and that

1 plaintiff has lost customers as a result thereof, (see Compl. ¶ 37), are sufficient. See Waits  
2 v. Frito-Lay, Inc., 978 F. 2d 1093, 1109 (9th Cir. 1982) (holding plaintiff who alleges injury  
3 by reason of competitor's false representations in advertisements has standing to bring  
4 claim for unfair competition under Lanham Act).

5       2. Although defendant argues plaintiff lacks standing to bring a claim under the Real  
6 Estate Settlement Procedures Act ("RESPA") and, alternatively, has failed to state a claim  
7 under RESPA, such arguments are unavailing because plaintiff has neither alleged nor  
8 attempted to allege a claim under RESPA. Although the complaint alleges defendant has  
9 "falsely advertis[ed]" that it offers services in compliance with RESPA, (see Compl.  
10 ¶ 23), a false advertising claim based on a defendant's having falsely stated it is in  
11 compliance with a federal law is not transformed into a claim for relief under the federal law  
12 referenced in the defendant's advertisements. See, e.g., Alpharma, Inc. v. Pennfield Oil  
13 Co., 411 F. 3d 934, 939-41 (8th Cir. 2005) (holding plaintiff stated claim for false advertising  
14 based on allegation defendant falsely represented its product was approved by FDA;  
15 rejecting defendant's argument plaintiff's claim was "impermissible private attempt" to state  
16 claim under FDA regulations).

17       3. Defendant is not entitled, under the Colorado River doctrine, to a stay of the  
18 instant action in light of the state court action between the parties herein. Although  
19 defendant asserts some of the issues presented herein, perhaps even the majority of such  
20 issues, will be resolved in the state court proceeding, defendant has not shown that "the  
21 pending state court proceeding [will] resolve all issues in the federal suit." See Holder v.  
22 Holder, 305 F. 3d 854, 868-69 (9th Cir. 2002) (holding defendant not entitled under  
23 Colorado River doctrine to stay of federal proceeding in favor of state proceeding, where  
24 defendant showed some but not all issues presented in federal action would be resolved in  
25 state action). One issue presented herein that defendant has not argued, let alone shown,  
26 will be resolved in the state court proceeding is whether defendant, in its advertising, has  
27 used the symbol ™ in connection with words and phrases for which it has not obtained  
28 trademark protection. (See Compl. ¶ 33.)

## **CONCLUSION**

2 For the reasons stated, defendant's motion to dismiss or, in the alternative, to stay is  
3 hereby DENIED.

## **IT IS SO ORDERED.**

6 || Dated: August 3, 2006

*Maxine M. Chesney*  
MAXINE M. CHESNEY  
United States District Judge